United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING

75-1288

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1288

UNITED STATES OF AMERICA,
Appellant,

—v.—

HERBERT YAGI
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR THE UNITED STATES OF AMERICA FOR REHEARING

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Preliminary Statement

The United States of America respectfully petitions for rehearing of a decision of this Court, filed January 5, 1976, affirming an order of the Honorable Charles L. Brieant, United States District Judge for the Southern District of New York, dismissing without prejudice Indictment 73 Cr. 471 as to defendant Herbert Yagid for failure to comply with Rule 6 of the Southern District Plan for Achieving Prompt Disposition of Criminal Cases (the "Plan").

Reasons for this Petition

The Court could not agree whether this Court's earlier decision in *United States* v. *Roemer*, 514 F.2d 1377 (2d Cir. 1975), was controlling of the determination whether this Court's order of a new trial for Yagid, *United States* v. *Badalamente*, 507 F.2d 12 (2d Cir. 1974), *cert. denied*,

421 U.S. 911 (1975), was final within the meaning of Rule 6 of the Southern District Plan so long as Badalamente's petition for a writ of certiorari was pending in the Supreme Court. The majority of the Court held "*Roemer* to be distinguishable from the facts of this case" and "decline[d] the invitation to expand *Roemer* further" on the grounds that to do so "could mean that in this Circuit a defendant, by asserting spurious claims in a petition for certiorari seeking greater relief than his co-defendant has sought and won, could bind his co-defendant insofar as a speedy trial is concerned." Slip op. at 1442, 1445. Judge Mulligan, dissenting, found *Roemer* to be "controlling here" and suggested that the grounds in the majority opinion for refusing "to extend *Roemer*" were "far fetched". Slip op. at 1447-1448.

While the Government respectfully agrees with Judge Mulligan's view of the controlling applicability of *Roemer* in this case, we submit that the Court's affirmance of the order of the District Court raises an issue of greater significance than the proper construction of and adherence to existing precedent in this Circuit, important though those considerations are. Rather, the question presented by the majority opinion in this case, *Roemer* aside, is whether Rule 6 requires the District Courts, regardless of the circumstances, to retry one defendant while a co-defendant, properly joined in the indictment and at the initial trial, seeks a second trial for himself in an appellate court. We submit that there are substantial grounds for construing finality for purposes of Rule 6 to permit the District Courts to avoid piecemeal litigation in multi-defendant cases whether or not the activities of some co-defendants in pursuing appellate remedies benefit the rest. The contrary result in this and other cases which the majority's opinion compels is not, we respectfully suggest, consistent with the purposes of the District Court Plans recognized by the Court, slip op. at 1445, or with the prompt disposition of criminal cases in the already overburdened District Courts in this Circuit.

ARGUMENT*

Rule 6 of the Southern District plan should not be construed to require piecemeal litigation in multi-defendant cases.

The procedural context of this case is one in which the presence of properly joined multiple defendants highlights the substantial problems in the construction of the finality of orders of retrial or initial trial, *United States* v. *Roemer*, *supra*, 514 F.2d at 1380, under Rule 6 of the Plan. Other routine situations raise similar issues of the necessity for the District Courts to deal piecemeal with defendants in a multi-defendant case after an initial joint trial—or, as here, appeal—fails to produce an immediate and uniform disposition as to all defendants. For example, a multi-defendant trial may result in the conviction of some defendants and a jury disagreement as to others. The Court's construction of Rule 6 in this case would require the trial judge to hold a second trial of the case as to those who were the subject of the jury's disagreement while those convicted at the first trial simultaneously sought a new trial in this Court and the Supreme Court. Success in this Court by any appellant convicted at the first trial would require that the case be tried yet a third time. Success by other such appellants in the Supreme Court, under the Court's holding here, would require yet a fourth trial. Each such trial, if a conviction were obtained, would presumably generate a separate appeal with a separate record requiring consideration by different panels of this Court.

We respectfully submit that Rule 6 should not be construed to require the result which the Court provides here and which its decision in this case will impose in

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* The facts of this case are set forth in detail in the opinion of the Court.

other similar cases. The Court's conclusion that Rule 6 required Yagid's retrial to proceed while Badalamente sought a new trial in the Supreme Court appears to have been premised on the view that, absent some direct benefit to Yagid from Badalamente's activities in the Supreme Court, which the majority of the Court inexplicably found lacking, it was unfair to Yagid to let Badalamente's actions in the Supreme Court bind Yagid's speedy trial rights under the Plan. Significantly, however, the Plan makes specific provision that precisely such activities by co-defendants—and less commendable ones, as well—*do* bind the speedy trial rights of others under the Plan. Under Rule 5(e) of the Plan * the applicability of any one of the tolling provisions of Rule 5 to any defendant in a multi-defendant case suspends the Government's obligations under the Plan for a "reasonable period" as to all defendants who are joined for trial unless there is no good cause for not granting a severance. *See United States* v. *Lasker*, 481 F.2d 229 (2d Cir. 1973), *cert. denied*, 415 U.S. 975 (1974). The tolling provisions include periods in which one such defendant is pursuing pretrial motions or an interlocutory appeal or is the subject of other charges, *see* Rule 5(a), *compare United States* v. *Oliver*, 523 F.2d 253, 260-261 (2d Cir. 1975) (Lumbard, *C.J.*, concurring) *with United States* v. *Cangiano*, 491 F.2d 906, 909 (2d Cir.), *cert. denied*, 419 U.S. 904 (1974); periods of continuance requested by a defendant, *see* Rule 5(b); and periods during which a defendant is a fugitive or is unavailable by reason of incarceration elsewhere, *see* Rules 5(d) and (f), *United States* v. *Estremera*, Dkt. No. 75-1261 (2d Cir., February 2, 1976), slip op. at 1699-1700; *United States* v. *Oliver*, *supra*, *United States* v. *Lasker*,

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* The citations to the Plan are to that version promulgated by the District Court effective April 1, 1973, which was operative at the time of the District Court's action in this case. A revised version of the Plan, unchanged in the particulars here referred to, was adopted by the District Court in September, 1975.

supra. A substantially broader provision analogous to Rule 5(e) is found in the Speedy Trial Act. 18 U.S.C. § 3161(h)(7).

This Court has never expressed the view that the policies underlying the prompt disposition of criminal cases require that retrials be disposed of with such dispatch that the sound purposes underlying the tolling provisions applicable to the initial trials of criminal cases should be ignored. Nor do any reasons for such a view suggest themselves to the Government. What is clear is that finality under Rule 6, whatever the differences between *Roemer* and the majority opinion in this case, is not controlled by such mechanical and unpredictable factors as the issuance of this Court's mandate but rather is a flexible concept, to be construed in a manner consistent with the policies of the Prompt Disposition Plans of the District Courts. We respectfully submit that so long as the final disposition of a multi-defendant case after its initial trial and its adjudication in this Court on appeal requires a new trial as to at least one defendant, an order directing such a retrial should not be considered final for purposes of triggering the period for retrial provided by Rule 6 until all other properly joined defendants simultaneously seeking a new trial by way of appeal to this Court or petition for certiorari in the Supreme Court have exhausted those remedies, at least when, as here, no application is made for an immediate trial. *Cf. United States* v. *Lasker*, *supra*, 481 F.2d at 234.* The speculative danger per-

* The same result may be supported in this case on the grounds of "good cause" within the meaning of Rule 6 as it existed until its modification by the District Court in September, 1975, long after Judge Brieant had dismissed the indictment below and this appeal had been taken. Even if the order for Yagid's retrial were deemed final for Rule 6 purposes when this Court's mandate issued on December 12, 1974, delay in triggering the 90 period for Yagid's retrial until Badalamente's petition for certiorari was

[Footnote continued on following page]

ceived by the majority of the Court in the acceptance of this view—that one defendant "could" vitiate a co-defendant's rights under Rule 6 by a frivolous appeal—is not only not presented in this case but in any event is hardly as great as the likelihood that defendants in multi-defendant cases will obtain, under the doctrine announced by the Court, otherwise unnecessary severances and separate retrials by the use of the very appellate tactics the Court refers to.

Far more important, however, is the salutary effect on the prompt disposition of criminal cases in the District Courts which the construction of Rule 6 for which we contend would have. The policy underlying the Prompt Disposition Plans should focus, we submit, not on the fastest disposition possible of a particular case but rather on the fashioning of orderly and consistent procedures for the promptest disposition of *all* criminal cases. Such procedures must be established and interpreted with the realization that judicial resources are finite and, ultimately, limited. To interpret Rule 6 to provide for the running of its (then) 90 day period for Yagid's retrial during the pendency of Badalamente's petition for certiorari is to provide for the possibility—and in many cases the certainty—of multiple retrials when one would suffice, with the result that the District Courts cannot reach and try other criminal cases. Such a construction of the Plan and of Rule 6 would undermine the goals of the Plan by creating an unnecessary multiplicity of criminal proceedings and would subvert the very values it seeks to protect.

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acted upon by the Supreme Court would have been entirely proper within the provision of Rule 6 which permitted extensions of that period for "good cause". The same reasons which we submit support the view that the order of retrial should not have been considered "final" for Rule 6 purposes until denial of Badalamente's petition for certiorari apply equally in the construction of the then existing "good cause" provision of Rule 6.

CONCLUSION

The opinion of the Court should be modified, and the order of the District Court should be reversed.

Respectfully submitted,

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MICHAEL C. EBERHARDT,
Special Attorney,
United States Department of Justice,

JOHN D. GORDAN, III,
Assistant United States Attorney,
Of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MICHAEL C. EBERHARDT, being duly sworn, deposes and says that he is employed in the office of the Strike Force for the Southern District of New York.

That on the 20th day of FEBRUARY, 1976 he served 2 copies of the within BRIEF by placing the same in a properly postpaid franked envelope addressed:

HERBERT YAGID
677 RARITAN ROAD
CRANFORD, NEW JERSEY

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Michael C. Eberhardt

Sworn to before me this
20TH day of February, 1976

Steven K. Frankel
STEVEN K. FRANKEL
Notary Public, State of New York
No. 24-4607105
Qualified in Kings County
Commission Expires March 30, 1977